IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

FILED
NOV 14 1974
MICHAEL RODAK, JR., CLERK

No. ...74-586

LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, RANKIN L. BROWN, Superintendent, DeSoto Correctional Institution, and FLORIDA PAROLE AND PROBATION COMMISSION,

Petitioners,

against

WILLIE J. MEANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT L. SHEVIN
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IN THE

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OCTOBER TERM, 1974

No. .....

LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, RANKIN L. BROWN, Superintendent, DeSoto Correctional Institution, and FLORIDA PAROLE AND PROBATION COMMISSION,

Petitioners,

against

WILLIE J. MEANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners pray that a writ of certiorari issue to review the judgment of the Florida Supreme Court in the case of *Means v. Wainwright*, 299 So.2d 577 (Fla. 1974), opinion filed July 10, 1974, and rehearing denied September 24, 1974.

CITATIONS TO THE OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 299 So.2d 577. It is reproduced as Appendix "A" to this petition.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTION PRESENTED

WHETHER THE PETITIONER, FLORIDA PAROLE AND PROBATION COMMISSION, HAS THE RIGHT TO RESCIND AN UNEXECUTED GRANT OF PAROLE UPON LEARNING OF RESPONDENT'S CHANGED BEHAVIORAL STATUS AT THE INSTITUTION WHERE HE IS CONFINED.

STATEMENT OF THE CASE

Respondent was convicted of the crime of forgery in Collier County, Florida, on the 17th day of March 1972 and sentenced to a term of five years imprisonment in the Apalachee Department of Correction. A copy of the commitment and judgment and sentence is reproduced as Appendix "B" and "C" respectively to this petition. By letter dated October 15, 1973, respondent was notified that he had been granted a parole effective October 23, 1973. A copy of said letter is reproduced

as Appendix "D" to this petition. Subsequently, by letter dated October 16, 1973, respondent was notified that his parole had been rescinded because he had received a disciplinary report on October 3, 1973. A copy of said letter is reproduced as Appendix "E" to this petition.

Respondent filed his petition for writ of habeas corpus in the Florida Supreme Court on March 19, 1974. The writ issued on April 4, 1974. Petitioners' return to the writ was filed in the Florida Supreme Court on or about the 30th day of April 1974. A copy of said return is reproduced as Appendix "F" to this petition. On July 10, 1974, the Florida Supreme Court handed down its decision holding that the minimal requirements of due process enumerated in the case of *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L.Ed.2d 484, 494, 92 S.Ct. 2593, 2600 (1972), are to be applied in parole recision proceedings once a person has been notified of his grant of parole, even though such grant has been unexecuted. The court further held that respondent should be placed on parole unless he is afforded a parole recision hearing consistent with the due process requirements as outlined in *Morrissey v. Brewer, supra.* A copy of the opinion of the Florida Supreme Court is reproduced as Appendix "A" to this petition. On May 30, 1974, the Fifth Circuit Court of Appeals decided *Sexton v. Wise*, 494 F.2d 1176 (5th Cir. 1974), holding that prison officials need not provide notice and

hearing to a prisoner who has been granted a parole effective on a future date but who is not yet at liberty before summarily rescinding parole. Based on the decision of the Fifth Circuit in *Sexton v. Wise, supra,* petitioners filed their petition for rehearing and/or modification on or about the 16th day of July 1974. Attached to said petition was a copy of the slip opinion handed down in *Collie v. Shuford,* Case No. 74-311-CJV-JE, dismissing a petition for writ of habeas corpus based upon the issue decided in *Sexton, supra.* A copy of the petition for rehearing and/or modification, together with the attached opinion is reproduced as Appendix "G" to this petition. Petitioners'petition for rehearing and/or modification was denied by order of the Florida Supreme Court dated September 24, 1974.

Reasons for Granting the Writ

The Florida Supreme Court has decided a federal question of substance not heretofore determined by this Court and has decided it in a way not in accord with applicable decisions of this Court.

The decision of the Florida Supreme Court stands for the proposition that the recision of respondent's unexecuted grant of parole without notice and adjudicatory hearing was a violation of his constitutional rights to procedural due process and equal protection of the law.

The Florida court's decision is structured on the premise that the minimal due process requirements enumerated in *Morrissey* and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), are applicable to unexecuted grants of parole. Petitioners submit that such a holding is patently erroneous and constitutes an unwarranted extension of this Court's holding in *Morrissey*.

Petitioners do not read *Morrissey* as abrogating the well settled rule under federal case law that eligibility for parole is within the discretion vested in the parole authority. *Thompkins v. U. S. Board of Parole*, 427 F.2d 222 (5th Cir. 1970). The rule is similar in this jurisdiction. Petitioner, Florida Parole and Probation Commission, has the statutory duty of determining what persons shall be placed on parole and fixing the times and conditions of parole. Section 947.13, Florida Statutes, 1972 Supp. Additionally, Section 947.16(2), Florida Statutes, provides:

> "Persons who have become eligible for parole and who may in the discretion of the commission be granted parole shall be placed on parole in accordance with the provisions of this law."

The decision of the Florida Supreme Court *sub judice* clearly infringes on the discretionary powers of the Florida Parole and Probation Commission. In his

petition for writ of habeas corpus, respondent claimed a constitutional right under the Due Process Clause of the Fourteenth Amendment to the federal constitution, as said clause has been construed by this Court in *Morrissey*, to notice and adjudicatory hearing before petitioner, Florida Parole and Probation Commission, would be entitled to rescind an unexecuted grant of parole. Such is the constitutional right claimed by petitioner and granted by the decision of the Florida Supreme Court. It is this issue that petitioners seek to have this Court review because it has not been heretofore determined by this Court, and the court below decided it in a way not in accord with the applicable decisions of this Court.

The decision of the Fifth Circuit in *Sexton v. Wise*, 494 F.2d 1176 (5th Cir. 1974), is diametrically opposed to the decision of the court below. In *Sexton*, the Fifth Circuit had precisely the same issue before it as did the Florida Supreme Court *sub judice*. There, without knowledge of Sexton's unauthorized change in employment, the parole authority issued a parole on November 7, 1972, effective November 16, 1972. Sexton signed the conditions of the parole certificate (something that was admittedly not done *sub judice*). However, when Sexton's violation came to light, he was subsequently informed that he was not going to be paroled. The parole authority met on November 28, 1972, but Sexton

was given no notice to appear nor was he given any written statement of the charges against him. It was at this hearing that Sexton's parole was officially rescinded. An evidentiary hearing was held in the District Court and it was ordered that a writ of habeas corpus be granted unless within 60 days the parole authority provided a hearing with due process as outlined in *Morrissey*. The government appealed. In reversing, the Fifth Circuit commented as follows:

> "We hold that Sexton was not entitled to a hearing since the process of obtaining parole had never reached completion and the due process protections of Morrisey v. Brewer, applicable to revocation, were not applicable.
>
> * * *
>
> "Until a parole is finalized, no constitutional protections associated with a parole revocation embrace the intended parolee.
>
> "It is well settled that eligibility for parole is within the wide latitude of discretion vested in the Board of Parole. Thompkins v. U.S. Board of Parole 5 Cir., 1970, 427 F.2d 222; . . . Notice of a future date for release on parole, however does not bestow upon the

intended parolee a right to that parole prior to final physical release by the Bureau of Prisons. Before a prisoner can be officially paroled, the final step of physical release must be taken.

"While a prisoner remains in the custody of prison officials, he continues to be subjected to their supervision and the wide discretion of the Board of Parole. The regulations are clear that until final physical release occurs, the Board does not relinquish its broad discretionary powers to rescind any future parole."

* * *

"The Board never gave up its custody of Sexton and therefore could properly rescind his conditional parole without affording him a full *Morrisey* hearing. The notice of denial was not tantamount to a revocation of parole invoking full constitutional safeguards. To require a full *Morrisey* hearing at this stage would be an extravagant remedy infringing on the discretionary powers of the Board of Parole.

"Reversed and remanded."
Id. at 1177, 1178.

See also *Koptik v. Chappell*, 321 F.2d 388 (D.C. Cir 1963). What the court below has done by holding the minimal due process requirements of *Morrissey* to be applicable to respondent's unexecuted grant of parole is to create a right where none had previously existed. The importance of this federal question can only be appreciated when viewed in the light of the total number of unexecuted paroles that are rescinded because of violations that subsequently come to the attention of the parole authority.

Because of the importance of the question presented and because of the constitutional right claimed under the Constitution to notice and adjudicatory hearing before an unexecuted grant of parole may be rescinded, it is respectfully submitted that this Court should take jurisdiction.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: November 8, 1974.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General of the
State of Florida
Attorney for Petitioners

WALLACE E. ALLBRITTON
Assistant Attorney General
of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded via U. S. Mail to Honorable Michael R. Masinter, Florida Rural Legal Services, Inc., P. O. Box 1109, Immokalee, Florida 33934, attorney for respondent, this 8th day of November 1974.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

APPENDIX "A"

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1974

WILLIE J. MEANS,

Petitioner,

v. CASE NO. 45, 223

LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, RANKIN L. BROWN, Superintendent, DeSoto Correctional Institution, FLORIDA PAROLE AND PROBATION COMMISSION,

Respondents.

Opinion filed July 10, 1974
A Case of Original Jurisdiction - Habeas Corpus

Michael R. Masinter and Ann Yalman of Florida Rural Legal Services, Inc., for Petitioner

Robert L. Shevin, Attorney General; and Wallace E. Allbritton, Assistant Attorney General, for Respondents

ADKINS, C.J.

This cause is before us on writ of habeas corpus and return thereto. Fla. Const., art. V, § 3(b)(6), F.S.A.

APPENDIX "A"

The petitioner is a prisoner in the DeSoto Correctional Institution and was granted parole on October 4, 1973. By letter dated October 15, 1973, the Commission notified the petitioner that his parole had been granted and that he was to be released from prison on October 23, 1973. Although his parole agreement concerning the terms and conditions of his parole was formulated on October 19, 1973, the petitioner actually never signed the certificate of parole. On October 16, 1973, the Commission rescinded his parole because of a disciplinary report of October 3, 1973. This report stated that petitioner had been found guilty at a disciplinary hearing of violating Furlough Agreement No. 3, which states, "I will refrain from consuming any alcoholic beverages."

Petitioner alleges that his parole was rescinded without being afforded prior notice and an adjudicatory hearing. Petitioner states that he was not present during any consideration of the rescission of his parole, and that at no time was he offered the opportunity to present evidence, cross-examine adverse witnesses, be represented by counsel, or obtain the transcript of the parole rescission determination. Petitioner submits that such rescission of his parole violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

APPENDIX "A"

The question we are confronted with is whether the rescission of petitioner's unexecuted grant of parole without notice and an adjudicatory hearing violated his constitutional rights to procedural due process and equal protection of the law.

In their return to our issuance of the alternative writ, respondents submit that, since petitioner was never per se granted parole in that the parole agreement was never executed by signature of the petitioner, it was not constitutionally impermissible to rescind such unexecuted grant of parole without affording petitioner notice of its intention and a hearing. Respondents rely heavily on the case of Koptik v. Chappell, 321 F.2d 388 (D.C. Circuit, 1963), and the cases cited therein. However, these cases were rendered prior to the recent pronouncements of the United States Supreme Court on this subject.

The landmark decisions of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), laid down the rudimentary constitutional protections the United States Supreme Court felt should be afforded the parolee and probationer. In Morrissey the Court held that the "minimal requirements of due process" in final parole revocation proceedings include

(a) written notice of the claimed

violations of parole;
(b) disclosure to the parolee of evidence against him;
(c) opportunity to be heard in person and to present witnesses and documentary evidence;
(d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
(e) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
(f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

In Gagnon the Court extended the "minimal due process requirements" set forth in Morrissey to probation revocation proceedings. The Court found that there was no difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation.

We are, naturally, bound by the Supreme Court's determinations in Morrissey and Gagnon to the extent that they establish minimal due process requirements in parole and probation revocation proceedings, and we have so acknowledged in the cases of Bernhardt v. State, 288 So.2d 490 (Fla. 1974), and

most recently in Dees v. State, Case No. 44,315, opinion filed May 22, 1974. In the instant case, although we are not confronted with a revocation of parole, but rather with the rescission of an unexecuted grant of parole, we cannot distinguish such proceedings in principle insofar as the demands of due process are concerned. Respondents strongly emphasized the fact that petitioner did not sign the parole certificate. Consequently, respondents submit that the lack of such signature and the failure to "fully" execute the parole agreement should necessitate the denial to petitioner of minimal requirements of due process in such rescission. We cannot agree.

The Supreme Court, in considering the applicability of due process standards to parole revocations, declared that procedural protections are due when "an individual will be 'condemned to suffer grievous loss'." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972). Cognizant of the fact that the instant case does not concern parole revocation, we nonetheless find that the rescission of the unexecuted grant of parole inflicted such "grievous loss" on petitioner that he should have been accorded certain procedural protections prior to such rescission. Petitioner was notified by letter dated October 15, 1973, that he had been granted parole effective October 23, 1973. By letter dated

APPENDIX "A"

October 16, 1973, petitioner was told that his grant of parole was rescinded because of a prior disciplinary report. We feel that the consequences of this summary deprivation of petitioner's prior grant of conditional liberty was a "grievous loss," as great as the revocation of a parolee's or a probationer's conditional liberty.

The California Supreme Court case of In re Prewitt, 503 P.2d 1326 (Cal.S.Ct. 1972), is of special significance. The Court concluded that the minimum due process requirements of Morrissey, with the exception of the preliminary hearing, are constitutionally required for parole rescission hearings. In so holding, the Court recognized that the "grievous loss" suffered by the person whose parole is revoked is no different than the "grievous loss" suffered by the person whose unexecuted grant of parole is rescinded. The court stated:

> "Although the proceedings of which petitioner complains were not for revocation of parole but for rescission of an unexecuted grant of parole, we can perceive no significant distinction between the deprivation of the right to conditional liberty enjoyed by a parolee after release and the deprivation of the right to achieve such liberty after a grant thereof but before the date fixed for release. In either event the parolee has been de-

> prived of a valuable if limited right to be free . . . and the same or substantially the same protection must be accorded him in effecting that deprivation." (Emphasis ours.) 503 P.2d 1326, 1330.

The Supreme Court of the United States has decided that probationers and parolees are entitled to due process at revocation hearings. In applying this principle as set forth in Gagnon v. Scarpelli, supra, and Morrissey v. Brewer, supra, there is no difference relevant to the guarantee of due process between a revocation of parole and a rescission of parole. In the case sub judice, the Parole and Probation Commission acted without giving petitioner notice or a hearing by which he could have conveyed an excuse or an instance of mitigation which may have affected the decision for rescission.

We hold that, with the exception of the preliminary hearing, the minimal requirements of due process enumerated in the case of Morrissey v. Brewer, supra, are to be applied in parole rescission proceedings once a person has been notified of his grant of parole, even though such grant has been unexecuted.

The writ of habeas corpus should issue. The Petitioner should be placed upon parole unless he is afforded a parole rescission hearing consistent and conform-

ing to the due process mandate as outlined in Morrissey v. Brewer, supra, within thirty (30) days of the filing of this opinion.

It is so ordered.

ROBERTS, ERVIN, BOYD and McCAIN, JJ., Concur

APPENDIX "B"

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
OF DIVISION OF CORRECTIONS

IN THE CIRCUIT COURT TWENTIETH JUDICIAL
(Court)
CIRCUIT, COLLIER County. SPRING Term,
1972 Conviction for FORGERY
(Offense)
Date of conviction March 17th, 1972
Date of sentence imposed March 17th, 1972
Term of sentence FIVE YEARS APALACHEE DEPARTMENT OF CORRECTION TO RUN CONCURRENT WITH ANY OTHER SENTENCE IMPOSED.
Credit given for time served.

STATE OF FLORIDA, 033732

Plaintiff, COLORED MALE

vs. MAR 21 1972

WILLIE JAMES MEANS
Defendant.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

APPENDIX "C"

imposed. Credit to be given for time served.

STATE OF FLORIDA)
COUNTY OF COLLIER)

I, Margaret T. Scott, Clerk Circuit Court, Collier County, Florida DO HEREBY CERTIFY that the foregoing is a true and correct copy of the Judgment and Sentence in said case, as shown by the records and files of this office.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17th day of March, 1972

Margaret T. Scott, Clerk

By Martha Anderson D.C.

APPENDIX "D"

FLORIDA PAROLE AND PROBATION COMMISSION
P. O. Box 3168 1117 Thomasville Road
Tallahassee, Florida 32303
October 15, 1973

Willie James Means PR#33732
Desoto Correctional Institution
Arcadia, Florida

Dear Mr. Means: CO#156722

After careful consideration, the Florida Parole and Probation Commission has granted you a parole effective October 23, 1973 until June 23, 1975

Parole is something to be proud of. The Commission, in voting it, has indicated a desire to help you help yourself. When you leave prison, do so with the firm intention of making good.

Sincerely,

/s/ Armond Cross

Chairman

ARC:kn

APPENDIX "E"

FLORIDA PAROLE AND PROBATION COMMISSION
P. O. Box 3168 1117 Thomasville Road
Tallahassee, Florida 32303
October 16, 1973

Willie James Means, PR #033732
DeSoto Correctional Institution
Arcadia, Florida

CO #156722

Dear Mr. Means:

This is to inform you that the Commission has rescinded your parole due to the Disciplinary Report you received on October 3, 1973.

The Commission will continue to observe your adjustments in prison and has set your case up for another interview in June of 1974.

Very truly yours,

/s/ Armond Cross

Chairman

ARC/bw
cc: Mr. Rankin Brown, Supt.

APPENDIX "F"

IN THE SUPREME COURT OF FLORIDA

WILLIE J. MEANS,

Petitioner,

-v- CASE NO. 45,223

LOUIE L. WAINWRIGHT, Director Division of Corrections, State of Florida, RANKIN L. BROWN, Superintendent, DeSoto Correctional Institution, FLORIDA PAROLE AND PROBATION COMMISSION,

Respondents.

RETURN

COMES now respondents, by and through undersigned counsel, and make this return to the writ of habeas corpus heretofore issued by this court on the 4th day of April 1974 and says:

I.

Respondent Wainwright holds petitioner in custody pursuant to a commitment, judgment and sentence, and information, all of which are attached hereto and marked as Exhibits 1, 2, and 3 respectively. Respondent Brown makes the same response as Respondent Wainwright above. Respondent Florida Parole and Probation Commission admits that it has

the statutory authority to grant paroles but affirmatively denies that any parole was ever granted to petitioner or that any parole agreement was ever executed by petitioner.

II.

Petitioner contends that a parole was granted to him and then the Florida Parole and Probation Commission rescinded said parole without first affording petitioner a notice of its intention and a hearing contrary, so petitioner urges, to the basic concepts of fundamental fairness.

Respondent denies that any parole agreement or "parole" as the term is commonly understood to mean was ever granted to petitioner. In his petition, on page 4 thereof, petitioner admits he never signed the certificate of parole. Respondent Parole Commission alleges that its decision to grant petitioner a parole was based on petitioner's then known existing behavioral status at the institution where he was confined. When it became known that petitioner's status had changed, respondent Parole Commission rescinded its decision to offer a parole to petitioner on stated terms and conditions.

The issue, then, before this court is not whether respondent Parole Commission revoked a previously granted and executed agreement of parole without first afford-

ing petitioner a notice and hearing but rather, whether said respondent has the right to change its mind as to offering a parole on stated terms and conditions upon learning that there has been a change in petitioner's behavioral status at the institution where he is confined. The issue then, as respondents understand it, can be stated thusly:

> WHETHER THE RESPONDENT FLORIDA PAROLE AND PROBATION COMMISSION HAS THE RIGHT TO CHANGE ITS MIND ABOUT OFFERING A PAROLE TO AN INMATE UPON LEARNING OF THE INMATE'S CHANGED BEHAVIORAL STATUS IN THE INSTITUTION WHERE HE IS CONFINED.

Section 947.13(1)(a), Florida Statutes, clearly states that the Parole Commission has the power and duty of determining what persons shall be placed on parole. Section 947.18 provides in pertinent part as follows:

> "No person shall be placed on parole until and unless the commission shall find that there is reasonable probability that, if he is placed on parole, he will live and conduct himself as a respectable and law abiding person, and that his release will be compatible with his own welfare and the welfare of society."

Section 947.17(1) provides that:

APPENDIX "F"

"A person shall be placed on parole upon the initiative of the commission and with the consent of such person."

It is respondents' position that respondent Parole Commission has the statutory authority to determine that petitioner should not be placed on parole after learning of his changed behavioral status in the institution. Petitioner admits that the certificate of parole was never signed and thus he never consented to the terms and conditions of the parole as stated thereon.

Respondents rely heavily on Koptik v. Chappell, 321 F.2d 388 (D.C. Cir 1963), and quotes extensively therefrom as follows:

"Appellant was convicted in the Northern District of Indiana on May 1, 1961, for the offense of transportation of forged Government securities in interstate commerce. By amendment, his sentence was modified the same month to provide that he could become eligible for parole at such time as the Parole Board might determine. On June 20, 1962, an order was entered granting parole effective September 10, 1962. The order recited that the Board had 'now carefully examined all the information and evidence at its disposal in relation to this

APPENDIX "F"

applicant.' The record shows that prior to the time this order was entered it was unknown to the Parole Board that appellant had been involved in a disciplinary proceeding at the institution in which he was confined, which had resulted in 'two weeks restriction from viewing television and going to the yard.' On July 2, 1962, the Parole Board entered an order reopening and denying the application for parole. At this time the appellant was still in the institution and had not been released.

"The disciplinary action was based on charges that appellant had been paid the sum of $200 by the wife of an inmate of the institution as compensation for drafting a legal document for the inmate, and that appellant, 'a former attorney,' was practicing law on the premises of the institution and was in violation of a rule of the Bureau of Prisons and the penitentiary where he was confined, by rendering legal assistance to other inmates of the institution; and further, that he had used a typewriter without permission to do so.

APPENDIX "F"

"Although appellant claims that the charges against him are untrue, it is true that he did receive disciplinary punishment for violation of the regulations. We do not think we can go back of the fact that the matter was considered by the prison authorities and that it was not known by the Parole Board at the time the parole application was granted.

* * *

"We have also held that the Parole Board's discretion in granting parole is not subject to judicial review. Story v. Rives, 68 App.D.C. 325, 329, 97 F.2d 182, 186 (1938), cert. denied, 305 U.S. 595, 59 S.Ct. 71, 83 L.Ed. 377. Title 18 U.S.C. § 4203(a) provides, in pertinent part:

"'If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.'

APPENDIX "F"

* * *

"A parole board's rescission of its prior resolution granting a prisoner a parole before the parole becomes effective has been held not to be void, even in a case where the prisoner was not given notice of the intended rescission or accorded a hearing thereon. Ex parte Allen, 27 CalApp2d 447, 81 P.2d 168 (1938). It has been contended that the prisoner is on parole from the time the original resolution is passed, and that an order of rescission takes from him a vested right with out due process of law. This contention has been rejected in the following cases: In re Green, 27 Cal. App.2d 450, 81 P.2d 247 (1938); United States ex rel. Lashbrook v. Sullivan, 55 F.Supp. 548 (E. D.Ill. 1944); United States ex rel. Mitchell v. Shuttleworth, 106 F.Supp. 1013 (N.D. Fla. 1952); State ex rel. Newman v. Lowery, Ohio App., 104 N.E.2d 590 (App. 1951), aff'd, 157 Ohio St. 463, 105 N.E.2d 643, cert. denied, 344 U.S. 881, 73 S.Ct. 176, 97 L.Ed. 682 (1952). We have been cited no case, and have found none, where a different conclusion has been reached.

* * *

APPENDIX "F"

"The disciplinary action had not been called to the attention of the Board at the original hearing; and we think that, when that action was called to its attention, the Board had the right to reconsider its original decision.

"We do not mean to indicate that, if the matter of the disciplinary action had been called to the attention of the Board, it would have been subject to our scrutiny. We hold that until the prisoner is actually released, the Board has the power to 'reopen and advance, postpone or deny a parole which has been granted.'

* * *

"We add that we think we certainly should not tinker with the action of the Parole Board in granting or denying parole where the prisoner is still in the penal institution.

"Affirmed."

The decision of the Court of Appeals for the District of Columbia has been followed and cited with approval in United States ex rel. Felder v. United States Board of Parole, 307 F.Supp. 159 (D.C.D.Conn. 1969); Ott v. Ciccone, 326 F.Supp. 609 (D.C. W.D.Mo. 1970). Interestingly, one of the cases cited

as authority for the position taken in Koptik by the Court of Appeals is United States ex rel. Mitchell v. Shuttleworth, 106 F.Supp. 1013 (D.C. N.D.Fla. 1962), wherein the District Court held that although the United States Parole Board had granted relator a parole effective in the future, it was authorized to revoke said parole prior to the release of relator from prison. The latest in point decision that research has revealed is that of the Supreme Court of New Mexico in Williams v. New Mexico Department of Corrections, 504 P.2d 631. There, the defendant had been granted a parole pending an approved parole plan but before the plan could be approved and before defendant was released, a disciplinary report was filed against him. The New Mexico Supreme Court held that he was not entitled to a hearing prior to the vote by the Parole Board to cancel the pending parole. In so holding, the New Mexico Supreme Court relied heavily on Koptik v. Chappell, supra, and cited with approval United States ex rel Mitchell v. Shuttleworth, supra.

The cases cited in petitioner's brief are easily distinguishable. For example, In re Prewitt, 503 P.2d 1326, appears to be contrary to the authorities hereinabove cited. But upon a close reading of the opinion in Prewitt, we find at Footnote 6 the following:

"We note that, as petitioner in the instant case had not been

> actually released on parole and thus was continually in lawful custody prior to the order rescinding the grant of parole, the preliminary hearing which Morrissey provides for in the case of parole revocations would not be compelled here by due process considerations."

The California Supreme Court on concluding its opinion in Prewitt remarked that:

> "Inasmuch as the record does not establish that petitioner is entitled to release at this time, the order to show cause is discharged and the petition denied."

Sexton v. United States, 352 F.Supp. 147 (D.C. N.D.Tex. 1972), is easily distinguishable. There, the parole had been granted; the certificate of parole had been issued and signed by the Youth Correction Division; and the conditions of parole in the certificate of parole were agreed to and signed by the petitioner Sexton. Those controlling facts simply do not appear in the case sub judice.

III.

Each and every allegation challenging the legality of petitioner's incarceration not heretofore specifically answered or denied is hereby severally denied and the contrary allegation lodged.

APPENDIX "F"

CONCLUSION

The writ heretofore issued should be discharged and the petition denied.

Robert L. Shevin
Attorney General

Wallace E. Allbritton
Assistant Attorney General

COUNSEL FOR RESPONDENTS
The Capitol
Tallahassee, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Return to Honorable Ann Yalman, Florida Rural Legal Services, Inc., P. O. Box 1109, Immokalee, Florida 33934, by mail, this 29th day of April 1974.

Wallace E. Allbritton
Assistant Attorney General

of Counsel

APPENDIX "G"

IN THE SUPREME COURT OF FLORIDA

WILLIE J. MEANS,

Petitioner,

vs. CASE NO. 45,223

LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida; RANKIN L. BROWN, Superintendent, DeSoto Correctional Institution; and FLORIDA PAROLE AND PROBATION COMMISSION,

Respondents.

PETITION FOR REHEARING AND/OR MODIFICATION

Come now the Respondents LOUIE L. WAINWRIGHT, RANKIN L. BROWN, and THE FLORIDA PAROLE AND PROBATION COMMISSION, by and through their undersigned counsel, and file this their Petition for Rehearing and/or Modification of the opinion filed July 10, 1974, in the above-styled cause, showing as follows:

This Court, when it rendered its opinion, did not have the benefit of the recent decision of the United States Court of Appeals for the Fifth Circuit in Sexton v. Wise, Case No. 73-1460, opinion filed May 30, 1974, in which the Fifth Circuit Court of Appeals, considering [long after Morrisey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d

484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 33 L.Ed.2d 656 (1973)] the very point raised by the Petitioner in the case at bar, held:

> "Until a parole is finalized, no constitutional protections associated with a parole revocation embrace the intended parolee."
>
> "While a prisoner remains in the custody of prison officials, he continues to be subjected to their supervision and the wide discretion of the Board of Parole. The regulations are clear that until final physical release occurs, the Board does not relinquish its broad discretionary powers to rescind any future parole. (28 C.F.R. § 2.20)."
>
> "The Board never gave up its custody of Sexton and therefore could properly rescind his conditional parole without affording him a full Morrisey hearing."

Accord: Collie v. Shuford, Case No. 74-311-CJV-JE, U.S.D.C., Southern District of Florida, dismissing a Petition for Writ of Habeas Corpus based upon the issue decided in Sexton, supra, in an Order of Dismissal dated June 12, 1974, a copy of which is attached hereto and made a part hereof as Respondent's Exhibit "A". It seems clear, therefore, that Morrisey, supra, and Gagnon, supra,

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(as cited in the opinion) are no authority upon which to reach the conclusions contained in the opinion of the case at bar.

Moreover, the opinion filed in the instant case, either did not consider or overlooked the circumstance of an escape prior to release on parole, which escape would make such release on parole a physical impossibility; likewise a recission hearing could not be held as required by said opinion. Implicit in this situation would be the requirement that the escapee be extradited in order to conduct the hearing mandated in the opinion before an unexecuted grant of parole could be rescinded. The opinion should answer the question of whether this situation requires a recission hearing.

Wherefore, Respondents respectfully submit this Petition for Rehearing and/or Modification of the opinion filed July 10, 1974, and ask that said opinion be reheard and/or modified to reflect accord with the authorities and circumstances set forth above, and to deny the Petition for Writ of Habeas Corpus filed herein.

Respectfully submitted:

ROBERT L. SHEVIN
ATTORNEY GENERAL

WALLACE E. ALLBRITTON
ASSISTANT ATTORNEY GENERAL

APPENDIX "G"

By_____
George R. Georgieff
Assistant Attorney General

The Capitol Building
Tallahassee, Florida

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing and/or Modification has been furnished Ann Yalman, Counsel for Petitioner, at Florida Rural Legal Services, Inc., P. O. Box 1109, Immokalee, Florida 33934, by United States Mail, this 16th day of July 1974.

_____
George R. Georgieff
Assistant Attorney General

of Counsel

APPENDIX "G"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 74-311-CIV-JE

ALBERT COLLIE

v. ORDER OF DISMISSAL

PHILLIP P. SHUFORD,
Superintendent, Glades
Correctional Institution,
et al.

Albert Collie has filed this Petition for Writ of Habeas Corpus arising from a judgment and sentence entered in the Circuit Court of Dade County, Florida, in 1972. His tentative expiration date is September 14, 1975. Petitioner has filed various petitions and motions in this Court relating to previous convictions. See Collie v. Wainwright, Case No. 69-1386-CIV-JE.

Petitioner has exhausted his state remedies as to the ground presented in this petition, i.e.:

That his parole was unconstitutionally rescinded.

Facts

On August 31, 1973, the Florida Parole and Probation Commission, pursuant to Florida Statutes, voted for and ordered that the petitioner be released

APPENDIX "G"

on parole as soon as a "parole plan has been developed." On September 10, 1973, a Certificate of Parole was signed by the Director of the Florida Parole and Probation Commission ordering petitioner's release on September 18, 1973, "subject to the conditions on the reverse side of this certificate." On September 10, 1973, petitioner was notified that he had been granted a parole effective September 18, 1973. On September 10, 1973, petitioner was also notified that he had transported marihuana into Glades Correctional Institution and he was immediately placed in administrative segregation where he so remained until October 8, 1973. The petitioner was furnished with the disciplinary report.

Respondent sets forth that the principles of Morrisey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) do not apply here as there was no "revocation" of parole, rather a "recision" and, therefore, the Petitioner has not presented a claim cognizable in federal habeas corpus.

Petitioner's parole was not to be effective until September 18, 1973. He was never paroled. Therefore, federal habeas corpus will not lie. Whether the privilege of parole is to be granted is purely within the discretion of the paroling authority, parole not being a matter of right.

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In the case of Sexton v. Wise, # 73-1460, May 30, 1974, the Fifth Circuit Court of Appeals, considering the very point raised by the Petitioner in this case, held:

> "Until a parole is finalized, no constitutional protections associated with a parole revocation embrace the intended parolee."
>
> "While a prisoner remains in the custody of prison officials, he continues to be subjected to their supervision and the wide discretion of the Board of Parole. The Regulations are clear that until final physical release occurs, the Board does not relinquish its broad discretionary powers to rescind any future parole. (28 C.F.R. § 2.20)."
>
> "The Board never gave up its custody of Sexton and therefore could properly rescind his conditional parole without affording him a full Morrisey hearing."

For these reasons, it is hereby

ORDERED and ADJUDGED that Albert Collie's Petition for Writ of Habeas Corpus is hereby denied.

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DONE and ORDERED at Miami, Southern District of Florida, this 12 day of June, 1974.

/s/ Joe Eaton
United States District Judge

cc: Albert Collie
Stephen J. Press, Esq.
Linda Hertz, Esq.